STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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JUN 14 2013

S.C. Supreme Court

On Writ of Certiorari to the Court of Appeals
Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2013-000618

THE STATE,

Respondent,

vs.

JASON RAY FRANKS,

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Procedural History

On October 14, 2010, a York County Grand Jury indicted Petitioner for attempted murder. On December 13, 2010, Petitioner proceeded to trial. Assistant Public Defenders B.J. Barrowclough and Erik Delaney represented Petitioner, and Assistant Solicitor E.B. Springs represented the State. On December 15, 2010, the jury found Petitioner guilty of attempted murder. Because Petitioner had a prior conviction for homicide by child abuse, the Honorable John C. Hayes, III sentenced Petitioner to life without the possibility of parole based upon the two strikes law. On December 16, 2010, Petitioner filed a notice of appeal.

On January 16, 2013, the Court of Appeals affirmed Petitioner's conviction and sentence in an unpublished opinion. State v. Franks, 2013-UP-020 (filed January 16, 2013). On February 21, 2013, the Court of Appeals denied Petitioner's petition for rehearing. On May 23, 2013, Petitioner served a petition for writ of certiorari. This return follows.

Factual History

On June 7, 2010, Petitioner intentionally ran over Edward Mullins while Mullins was driving his moped. (R. pp. 167-168.) Mullins was a friend of Petitioner's neighbor, Anthony Valenti. (R. pp. 37-38; R. p. 159.) A week or two before the incident, Valenti hired Petitioner to wash his truck. (R. p. 160.) When Mullins arrived at Valenti's house, he asked Petitioner if Petitioner's tattoos and earrings meant Petitioner was a "queer." (R. p. 160; R. p. 176.) Mullins told Petitioner that if Petitioner was ever locked up with him, Petitioner "would have got all the chocolate candy bars he wanted." (R. pp. 160-161.) According to Mullins, that statement meant Petitioner would have been his "bitch" in

prison. (R. p. 161.) In response to Mullins' teasing, Petitioner told Mullins that he would stab Mullins. Thereafter, they went their separate ways.

A day later, Petitioner went to Valenti's house with a small club and told Valenti that he was going to "beat the breaks off of [Mullins] and he was going to stick it in [Mullins]." At trial, Valenti testified Petitioner threatened Mullins multiple times. (R. pp. 40-41.)

On the day of the incident, Mullins went to Valenti's house. (R. pp. 41-42.) Both Mullins and Valenti left the house in order to run errands. (R. p. 42.) Valenti followed Mullins as Mullins drove his moped to the gas station because Mullins was afraid he was going to run out of gas. (R. p. 43.) As Valenti left his driveway, Petitioner jumped off his front porch and jumped into his girlfriend's white SUV. According to Valenti, Petitioner cut him off and began chasing after Mullins. (R. pp. 43-50.)

At trial, Valenti testified that he was concerned about the fact that Petitioner was following Mullins so closely in the right lane, even though the left lane was clear. (R. pp. 47-49.) Valenti tried to get Mullins' attention in order to warn him about Petitioner. (R. p. 50.) However, Mullins just thought Valenti was waving at him. (R. p. 166.) Valenti had to go to his doctor's appointment, so he never saw the incident. (R. pp. 50-51.)

At trial, Taylor J. ("Taylor"), the daughter of Petitioner's girlfriend, testified. (R. p. 68.) During the time of the incident, Taylor lived next to Valenti with her mother and Petitioner. Taylor testified that she was home on the day of the incident. (R. p. 69.) When asked if Petitioner hastily entered the house around 2:00 p.m. and said, "I'm going to get him[,]" Taylor denied hearing and seeing that occur. (R. p. 69.) Thereafter, the Solicitor elicited the following testimony:

Q. Do you remember talking to your grandmother Pat Johnson about that day and Jason and you being in the house? Do you remember talking to her on the telephone after it happened?

A. Yes.

Q. Do you remember telling your grandmother Pat Johnson that Jason saw a man on the moped, left, ran out of the house and said that "I'm going to get him" and jumped in your mom's car? Do you remember saying that?

A. I remember when he came back in, he said that he had seen him leaving and he was going to wait a few minutes so he didn't run into him to leave.

Q. Taylor, Jason Franks didn't say that, did he?

A. Yes sir, I think he did.

Q. Who told you to say that, Taylor?

A. Nobody.

(R. p. 70.)

Next, the State called Patricia Johnson, Taylor's grandmother, to testify. (R. p. 73.) Patricia testified that Petitioner told her about Mullins' teasing. (R. p. 76.) While Petitioner was telling Patricia the story, he began pacing back and forth, and "[Petitioner] said that the first thought that came to his mind when Mr. Mullins made that remark to him was that he was going to slice [Mullins'] belly. And then he said the second thought that came to his mind was that he was going to go for [Mullins'] throat." (R. p. 76.) Also, Petitioner said, "that's okay, I'll get [Mullins]." (R. p. 76.)

Further, Patricia testified that she called Taylor several weeks after the incident and asked Taylor if she was at home when the incident took place. (R. p. 77.) When Patricia began testifying regarding Taylor's statements, Petitioner's trial counsel objected under Rule 613 (b), SCRE. Petitioner's trial counsel claimed the "time and place"

requirements of Rule 613 (b), SCRE had not been established during Taylor's testimony. (R. p. 78.)

At first, the trial judge did not recall the State laying the foundation of the time and place of the statement. But after the court reporter replayed Taylor's testimony, the trial judge ruled that the foundational requirements of Rule 613 (b), SCRE had been met. Thus, the State could use Patricia's testimony in order to impeach Taylor. (R. pp. 79-80.) Patricia testified that Taylor told her that when Petitioner saw Mullins get on his moped, Petitioner said, "I'm going to get him." (R. p. 81.) Thereafter, Petitioner ran out of the house.

Additionally, Mullins testified for the State. (R. p. 159.) Mullins' testimony was largely consistent with Valenti's testimony. Mullins admitted to teasing Petitioner a week or two before the incident. (R. pp. 160-161.) Mullins testified he was driving his moped approximately 25 miles per hour at the time of the incident. (R. p. 165.) Mullins noticed a white vehicle behind him, but the vehicle did not concern him at first. All of the other vehicles passed Mullins in the left lane, but Mullins could not figure why the white vehicle would not pass him. (R. p. 166.) Mullins realized Petitioner was the driver of the vehicle when Petitioner drove up next to him and started hollering and screaming. (R. pp. 166-167.) Petitioner pulled in front of Mullins' moped and pulled to the side of the road. Petitioner jumped out of his vehicle and pulled out a baseball bat. Mullins kept driving.

Thereafter, Mullins looked in his review mirror and saw Petitioner driving behind him at a high rate of speed. Mullins was hit from behind by Petitioner and was left on the side of the road bleeding. (R. pp. 167-168.) Petitioner revved his engine and fled from the scene. An ambulance came to the scene of the incident and took Mullins to the hospital.

(R. p. 169.) At trial, Mullins testified regarding the extent of his injuries. (R. pp. 169-174.)

During cross-examination, Petitioner's trial counsel impeached Mullins with two prior convictions for felony driving under the influence with the infliction of serious bodily injury and one prior conviction for leaving the scene of an accident. (R. pp. 179-180.) In addition, Petitioner's trial counsel brought out the fact that Mullins filed a civil lawsuit against Petitioner in order to recover money for his injuries. (R. pp. 181-182.) Furthermore, Mullins admitted to using cocaine approximately two days before the incident. (R. p. 170.)

When Petitioner's trial counsel began questioning Mullins about a physical altercation Mullins had in West Virginia, the State objected. (R. p. 184.) Petitioner's trial counsel proffered testimony regarding what occurred in West Virginia three weeks after the incident in this case. (R. pp. 185-188.) According to Mullins, he was accused of getting into a physical altercation with two women in West Virginia. (R. p. 186.) When the police came to the scene, Mullins ran away.

After hearing arguments from both sides, the trial judge ruled the proffered testimony was irrelevant and inadmissible. (R. p. 188.)

Thereafter, Petitioner's trial counsel once again impeached Mullins with a prior conviction for being a habitual traffic offender in 2009, a prior conviction for assault and battery of a high and aggravated nature in 2000, and a prior conviction for third degree arson in 2003. (R. p. 191; R. p. 192.)

Later on during the trial, Petitioner was able to elicit favorable testimony regarding the extent of Mullins' injuries from Kevin Ford, a paramedic for Fort Mill rescue. (R. p. 216.) Ford testified that Mullins' injuries were minor to moderate injuries.

ARGUMENT

I.

The Court of Appeals properly upheld the trial judge's exclusion of the West Virginia testimony because Petitioner failed to preserve his Rule 608 (c), SCRE argument. Further, Rule 608 (c), SCRE does not apply because the testimony did not show any bias, prejudice, or motive to misrepresent on the behalf of the victim. Also, the testimony was inadmissible because it was not relevant. Moreover, even if the testimony was relevant, it was inadmissible under Rule 403, SCRE. Regardless, even if the trial judge erred in excluding the testimony, Petitioner suffered no prejudice because Petitioner had already successfully impeached the victim.

Petitioner's argument regarding the exclusion of the proffered West Virginia testimony fails for **five** reasons: First, Petitioner failed to preserve his Rule 608 (c), SCRE argument because he never argued that ground to the trial judge. Second, even if the issue is preserved, Rule 608 (c), SCRE is inapplicable to this case because the West Virginia testimony did not show that the victim had any bias, prejudice, or motive to misrepresent. Third, the testimony was not relevant and therefore inadmissible under Rule 402, SCRE. Fourth, even if the evidence was relevant, the evidence was inadmissible under Rule 403, SCRE because the probative value of admitting the testimony was substantially outweighed by the danger of unfair prejudice. Finally, even if this Court finds that the testimony should have been admitted, any error in excluding the testimony was harmless because Petitioner had already successfully impeached the victim.

Standard of Review

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). Further, it is well settled that in ruling on the admissibility of evidence, the trial judge has considerable latitude

and his ruling will not be disturbed absent a showing of probable prejudice. State v. Kelly, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995).

A. Petitioner failed to preserve the Rule 608 (c), SCRE issue.

On appeal, Petitioner claims the West Virginia testimony was admissible because it was evidence of Mullins' bias and motive to misrepresent the truth. But Petitioner's trial counsel never made that argument at trial. (R. p. 188.) Thus, the Court of Appeals properly held that Petitioner's Rule 608 (c), SCRE argument was not preserved for review. (App. p. 2.)

An argument not raised and ruled on by the trial court is not preserved for appeal. State v. Nichols, 325 S.C. 111, 481 S.E.2d 118 (1997). Further, "a specific objection to the admission of evidence must be made to preserve the issue for appeal." McKissick v. J.F. Cleckley & Co., 325 S.C. 327, 344, 479 S.E.2d 67, 75 (Ct. App. 1996). In other words, "[t]he objection should be sufficiently specific to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the trial judge." Id. Moreover, "a party may not argue one ground at trial and an alternate ground on appeal." State v. Jones, 392 S.C. 647, 655, 709 S.E.2d 696, 700 (Ct. App. 2011).

In the case at hand, Petitioner's trial counsel argued that the testimony was admissible because the State presented evidence of Mullins' injuries. (R. p. 188.) But Petitioner's trial counsel **never** argued that the testimony was evidence of Mullins' bias, prejudice, or motive to misrepresent the truth. In other words, Petitioner is trying to argue a ground on appeal that he never argued at trial. Thus, any argument regarding Rule 608 (c), SCRE is not preserved for appellate review.

B. In any event, Rule 608 (c), SCRE is inapplicable to this case.

On appeal, Petitioner argues that the trial judge should have admitted the West Virginia testimony because it was evidence of Mullins' bias and motive to misrepresent the truth. But the testimony did not show any bias or motive to misrepresent the truth on the behalf of Mullins. Thus, Petitioner's Rule 608 (c), SCRE argument is without merit.

Under Rule 608 (c), SCRE, "[b]ias, prejudice, or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced." Under this rule, "[o]ur courts have held that 'anything having a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness may be shown and considered in determining the credit to be accorded to his or her testimony.'" State v. Burgess, 393 S.C. 396, 404, 712 S.E.2d 1, 5 (Ct. App. 2011) (citations omitted) *cert. granted* (Dec. 20, 2012); see State v. Dickerson, 395 S.C. 101, 117, 716 S.E.2d 895, 904 (2011) (holding that the proffered testimony did not elicit any evidence that might shed any light on a potential motive or basis for the doctor to misrepresent).

In Burgess, the Court of Appeals held that the narcotics officer's employment records were inadmissible under Rule 608 (c), SCRE because the records did not have a legitimate tendency to show bias on the part of the officer. Id. at 405, 712 S.E.2d at 5. The defendant wanted to introduce the arresting officer's employment records as evidence of bias and motive to misrepresent. Id. at 404, 712 S.E.2d at 5. After the officer arrested the defendant, the officer got in arguments with other officers and violated protocol. Id. Also, the officer threatened another officer, and the police department formally disciplined the officer for his bad behavior. Id. The Court of Appeals found the that the employment records were inadmissible because each incident occurred after the

defendant's arrest and none of the incidents related directly to the defendant. Id. at 405. 712 S.E.2d at 5. At the most, the incidents showed the officer was hot-tempered and uncooperative, but the incidents did not show the officer's bias against the defendant. Id.

Further, in State v. Mekler, the Court of Appeals held that the witness' statement to a police officer was inadmissible. 368 S.C. 1, 12, 626 S.E.2d 890, 895 (Ct. App. 2005). At trial, the witness testified that she was not afraid of the victim. Id. at 10, 626 S.E.2d at 895. In attempt to attack the witness' credibility, the defendant sought to introduce a statement that the witness made to a police officer that occurred two months before the defendant killed the victim. Id. The witness told the police officer that the victim threatened to kill the witness, and the witness said she was afraid of the victim. Id. at 11, 626 S.E.2d at 895. The Court of Appeals concluded that the defendant did not offer the evidence to show "'bias, prejudice, or any motive to misrepresent'" on the part of the witness. Id. at 12, 626 S.E.2d at 895. Rather, the defendant's trial counsel stated he was offering the evidence to generally attack the witness' credibility. Id. Thus, the defendant could not rely on Rule 608 (c), SCRE. Id.

Just like the defendants' trial counsel in Burgess and Mekler, Petitioner's trial counsel in this case did not offer the evidence in this case to show bias, prejudice, or any motive to misrepresent the truth on the part of Mullins. Rather, Petitioner sought to introduce the evidence to improperly attack Mullins' character. Unlike the co-defendant's prior favorable plea bargains with the solicitor's office in State v. Brown, 343 S.C. 562, 571, 541 S.E.2d 813, 818 (2001), the fact Mullins was able to run from police officers three weeks after the incident does not show any bias, prejudice, or motive to misrepresent the truth on the part of Mullins. The testimony had nothing to do with

Petitioner. Simply put, the West Virginia testimony does not fall within Rule 608 (c), SCRE.

C. The West Virginia testimony was not relevant; therefore, inadmissible under Rule 402, SCRE.

At trial, Petitioner's trial counsel argued that the West Virginia testimony was admissible because Mullins testified about his injuries and pictures of his injuries were admitted into evidence. (R. p. 188.) The State argued that the evidence was not relevant, and the trial judge agreed. The trial judge stated that the testimony might have been relevant in a civil case with respect to damages. But the extent of Mullins' injuries was not an element the State had to prove in order to convict Petitioner of attempted murder. (R. pp. 188-189.) Simply put, the testimony was not relevant.

Under the South Carolina Rules of Evidence, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE. Further, "Evidence which is not relevant is not admissible." Rule 402, SCRE.

Our legislature defined the crime of attempted murder as the following: "A person, who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder." S.C. Code Ann. §16-3-29.

When looking at the plain meaning of the attempted murder statute, it is clear that no injury is required in order for a defendant to be convicted of attempted murder. See State v. Jacobs, 393 S.C. 584, 587, 713 S.E.2d 621, 622 (2011) ("'The cardinal rule of statutory construction is to ascertain and effectuate legislative intent.' As such, a court

must abide by the plain meaning of the words of a statute. When interpreting the plain meaning of a statute, courts should not resort to subtle or forced construction to limit or expand the statute's operation. 'Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.'") (internal citations omitted).

As Petitioner concedes, the only issue in this case was whether Petitioner intentionally ran over Mullins or whether it was an accident.[1] (Pet. Cert. p. 11.) Thus, whether or not Mullins' injuries were as severe as he claimed was irrelevant to whether or not Petitioner intended to kill Mullins. In other words, Mullins' actions three weeks **after** Petitioner ran him over on his moped have nothing to do with Petitioner's intent at the time of the crime.

In summary, the trial judge properly held that the proffered West Virginia testimony was not relevant and therefore inadmissible under Rule 402, SCRE.[2]

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[1] Interestingly, neither party requested a jury charge on accident. (Supp. R. p. 1.)

[2] In Petitioner's petition for writ of certiorari, Petitioner states the following: "In any event Mullins certainly opened the door to it though his claims about his injuries." (Pet. Cert. p. 11.) But Petitioner never made an opening the door argument at trial, in his brief to the Court of Appeals, or in his petition for rehearing. See Rule 242 (c) (2), SCACR ("The petition for writ of certiorari shall contain the following . . . The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court.").

Further, Petitioner abandoned his opening the door "argument" in his petition for writ of certiorari because he only made a one sentence conclusory argument with no citation to any authority. See State v. Hill, 394 S.C. 280, 296-297, 715 S.E.2d 368, 377-378 (Ct. App. 2011) (holding the issue was abandoned when appellate counsel merely recited the extensive testimony and arguments of trial counsel without adopting trial counsel's argument, and appellate counsel only made a two sentence conclusory argument with citation to only one case with no analysis whatsoever as to why the case applied); State v. Colf, 332 S.C. 313, 332, 504 S.E.2d 360, 364 (Ct. App. 1998) (affirmed as modified by State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) (holding that a conclusory two-paragraph argument citing no authority other than an evidentiary rule was deemed abandoned on appeal).

D. The West Virginia testimony was inadmissible under Rule 403, SCRE.

Even if the West Virginia testimony was relevant, the testimony would have still been inadmissible under Rule 403, SCRE because the probative value of the evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading of the jury.

Under South Carolina's Rules of Evidence, evidence that is relevant "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE.

Here, the probative value of admitting the West Virginia testimony was minimal at best. The only real issue before the jury was whether Petitioner intended to run over Mullins or whether it was an accident. Thus, whether or not Mullins could run from the police three weeks after the incident was not relevant to the issue of Petitioner's intent. As discussed above, the extent of a victim's injuries is not an element the State has to prove in order to convict a defendant of attempted murder. Thus, if there was **any** probative value of admitting the West Virginia testimony, the amount of probative value would have been minute. Further, even if the West Virginia testimony was proper impeachment evidence, which the State submits that it is not, the probative value of using the testimony as impeachment evidence was also minute because Petitioner was allowed to impeach Mullins with numerous prior convictions. In other words, Mullins' credibility had already been called into question; therefore, additional impeachment evidence would have been merely cumulative.

On the other hand, the danger of unfair prejudice in admitting the West Virginia testimony was substantial. "Unfair prejudice means an undue tendency to suggest a

decision on an improper basis." State v. Owens, 346 S.C. 93, 610 S.E.2d 494 (2001), *overruled on other grounds by* State v. Gentry, 368 S.C. 93, 610 S.E.2d 494 (2005). If the trial judge admitted the testimony, the testimony would have just misled the jury into believing that the extent of Mullins' injuries was an element of attempted murder. The jury's sole focus should have been whether or not Petitioner acted intentionally and whether or not the State proved the elements of the offense beyond a reasonable doubt, not what Mullins did three weeks after Petitioner ran him over. Mullins' actions three weeks after Petitioner ran him over have no bearing on Petitioner's intent at the time Petitioner committed the crime.

In summary, the testimony was not relevant and therefore inadmissible. But if this Court finds that the testimony was relevant, the testimony was properly excluded because the probative value of admitting the testimony was substantially outweighed by the danger of unfair prejudice.

E. Regardless of any error in excluding the West Virginia testimony, Petitioner suffered no prejudice from the exclusion of the testimony.

"In determining harmless error regarding any issue of witness credibility, [courts] will consider the importance of the witness's testimony to the prosecution's case, whether the witness's testimony was cumulative, whether other evidence corroborates or contradicts the witness's testimony, the extent of cross-examination otherwise permitted, and the overall strength of the State's case." State v. Fossick, 333 S.C. 66, 70, 508 S.E.2d 32, 34 (1998) (citations omitted). Further, "[a]n error without prejudice does not warrant reversal." State v. King, 367 S.C. 131, 136, 623 S.E.2d 865, 867 (Ct. App. 2005).

Petitioner attempted to elicit the West Virginia evidence from Mullins because Petitioner wanted to paint Mullins as a liar. Even if this Court was to find that the West

Virginia testimony was proper impeachment evidence, any error in excluding the evidence was harmless because Petitioner's trial counsel had already successfully impeached Mullins with numerous prior convictions. In addition, Mullins admitted to using cocaine two days before the incident. Further, Petitioner was able to elicit favorable testimony regarding the extent of Mullins' injuries from Kevin Ford, a paramedic for Fort Mill rescue. (R. p. 125.) Thus, Petitioner suffered no prejudice from the exclusion of the West Virginia testimony.

II.

The Court of Appeals properly affirmed the trial court's admission of Taylor's prior inconsistent statement because the State laid a proper foundation under Rule 613 (b), SCRE. Regardless, even if the trial court erred, any error in admitting the prior inconsistent statement was harmless because the statement was merely cumulative to other properly admitted evidence.

Petitioner's Rule 613 (b), SCRE argument fails for two reasons: First, the State laid a proper foundation under Rule 613 (b), SCRE during Taylor's direct examination; therefore, Taylor's prior inconsistent statement was properly admitted. Second, even if the trial court erred in admitting the prior inconsistent statement, any error was harmless because the statement was merely cumulative to other properly admitted evidence, which included testimony from three other witnesses that Petitioner threatened to hurt the victim.

A. The State laid a proper foundation under Rule 613 (b), SCRE during Taylor's direct examination.

Petitioner contends the trial judge erred in allowing Patricia to testify regarding her conversation with Taylor, where Taylor told Patricia that on the day of the incident, Petitioner ran out of the house and said, "I'm going to get him." However, the State advised Taylor of the substance of the statement, the time and place that the statement was allegedly made, the person to whom the statement was made, and gave Taylor an opportunity to explain or deny the statement. After Taylor denied the statement, the State properly impeached Taylor with Patricia's testimony under Rule 613 (b), SCRE, which provides the following:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is advised of the substance of the statement, the time and place it was allegedly made, and the person to whom it was made, and

> is given the opportunity to explain or deny the statement. If a witness does not admit that he has made the prior inconsistent statement, extrinsic evidence of such statement is admissible. However, if a witness admits making the prior statement, extrinsic evidence that the prior statement was made is inadmissible.

Rule 613 (b), SCRE.

Notably, this Court pointed out that the purpose of the foundational requirements is to give the witness who is to be impeached "a fair opportunity to recollect and explain his [or her] statement[.]" State v. Hampton, 79 S.C. 179, 60 S.E. 669, 671 (1908).

In State v. Bixby, our Supreme Court held that the State laid a proper foundation under Rule 613 (b), SCRE. 388 S.C. 528, 551, 698 S.E.2d 572, 584 (2010). The State asked Rita Bixby if she remembered receiving a phone call from Alane Taylor. Id. After Rita admitted she received the call, the State asked Rita if she recalled making several different statements. Id. Rita denied making each statement. Id. at 552, 698 S.E.2d at 584. Thereafter, the State called Alane Taylor to the stand to impeach Rita's testimony. Id. The Court reasoned that the testimony was admissible because "[t]he record clearly reflected that Rita admitted having the conversation at issue but specifically denied making the statements later testified to by [Alane] Taylor. Thus, the State laid a proper foundation under Rule 613 (b), SCRE . . . ." Id. at 552, 698 S.E.2d at 585.

This case is similar to Bixby. Taylor admitted she remembered having a conversation with Patricia after the incident. (R. p. 70.) However, just like Rita Bixby, Taylor simply denied making the statement. Thus, Taylor knew exactly what the State was talking about when the State asked her about the conversation she had with Patricia. Therefore, there was no unfairness to Taylor. See Hampton, 79 S.C. 179, 60 S.E. at 671

(noting that the purpose of the foundational requirements is to give the witness a fair opportunity to recollect and explain his or her former statement).

Moreover, Rule 613 (b), SCRE does not require the proponent of the evidence to pinpoint the exact time that the statement was allegedly made. See State v. Moses, 390 S.C. 502, 523, 702 S.E.2d 395, 406 (Ct. App. 2010) (holding that the time requirement of Rule 613 (b) was established by stating "fall of 2006."); Hampton, 79 S.C. 179, 60 S.E. at 671(holding that the time requirement was established by stating "some time after the other trial in this case, at the last term of court . . . .").

In the case at hand, the incident occurred on June 7, 2010, and Taylor testified on December 14, 2010. Thus, the conversation occurred within six months of Taylor's testimony. Therefore, the State sufficiently narrowed down the time period in which Taylor made the statement. This was not a situation where the State asked Taylor if she remembered having some vague conversation with her grandmother in the past ten years. Further, the State identified the place where the statement was made, which was the telephone.

In summary, the State laid a proper foundation under Rule 613 (b), SCRE. Taylor was fully aware of what statement the State claimed she made to Patricia. Taylor simply denied making the statement. Thus, there was no unfairness to Taylor.

B. Regardless, any error in admitting the prior inconsistent statement was harmless.

Even assuming the admission of Taylor's prior inconsistent statement was error, any error was harmless because the statement was merely cumulative to other properly admitted evidence, which included testimony from three witnesses that Petitioner threatened to harm the victim. See State v. Holder, 382 S.C. 278, 289, 676 S.E.2d 690,

696–97 (2009) (holding the erroneous admission of evidence is harmless beyond a reasonable doubt where it is minimal in the context of the entire record and cumulative to other testimony admitted without objection); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (the admission of improper evidence is deemed harmless if it is merely cumulative to other evidence); see also State v. Mizzell, 349 S.C. 326, 333, 563 S.E.2d 315, 318–19 (2002) (noting whether an error is harmless depends on the particular facts of each case, including: the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case).

At trial, Valenti, Mullins, and Patricia all testified that Petitioner threatened to hurt Mullins. Also, there was evidence that Petitioner got out of his girlfriend's vehicle with a baseball bat and threatened to beat up Mullins right before the incident. Further, both Valenti and Mullins testified that Petitioner could have easily passed Mullins by moving to the left lane, thereby negating any argument that it was an "accident."

In summary, the State laid a proper foundation under Rule 613 (b), SCRE. But regardless of any error in admitting Taylor's prior inconsistent statement, there was overwhelming evidence of Petitioner's guilt in this case, and the prior inconsistent statement was merely cumulative to the other testimony in this case.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 14, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Writ of Certiorari to the Court of Appeals
Appeal from York County
The Honorable John C. Hayes, III, Circuit Court Judge
Appellate Case No. 2013-000618

THE STATE,

Respondent,

vs.

JASON RAY FRANKS,

Petitioner.

PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Return to Petition for Writ of Certiorari on Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

Robert M. Dudek, Esquire
S.C. Commission on Indigent Defense
Division of Appellate Defense
Post Office Box 11589
Columbia, SC 29211

I further certify that all parties required by Rule to be served have been served. This 14th day of June, 2013.

Ellen R. DuBois

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